

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLORIA DELGADO

Claimant

VS.

IBP, INC.

Self-Insured Respondent

Docket Nos. 265,611 and
267,234

ORDER

STATEMENT OF THE CASE

Claimant requested review of both of the July 24, 2007, preliminary hearing Orders entered by Administrative Law Judge Brad E. Avery. Respondent requested review of only the Order entered in Docket No. 267,234. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

In Docket No. 265,611, the Administrative Law Judge (ALJ) found that claimant suffered personal injury by an accident that arose out of and in the course of her employment. The ALJ also found that notice was timely given. However, the ALJ concluded that written claim was not timely and, accordingly, denied claimant's request for medical treatment.

In Docket No. 267,234, the ALJ found that claimant suffered personal injury by an accident that arose out of and in the course of her employment. The ALJ also found that notice was timely given. The ALJ, however, denied claimant's request for psychological care, finding that her need for such care stemmed from her injuries in Docket No. 265,611. The ALJ's ruling concerning temporary total disability was stayed and taken under advisement pending a report from Dr. George Fluter.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 20, 2007, Preliminary Hearing and the exhibits in Docket No. 265,611; the transcript of the July 20, 2007, Preliminary Hearing and the exhibits in Docket No. 267,234; the transcript of the deposition of Dr. Peter Bieri taken April 22, 2002, and the exhibits in Docket No. 267,234; the transcript of the deposition of Bud Langston taken November 14, 2002, and the exhibits in Docket No. 267,234; the transcript of the deposition of Dr. Lynn Curtis taken April 1, 2003, and exhibits in Docket No. 265,611; and

the transcript of the deposition of Dennis Linebarger taken July 29, 2004, and exhibits in Docket No. 265,611; together with the pleadings contained in the administrative files.¹

ISSUES

Claimant requests review of the ALJ's findings in Docket No. 265,611 relative to whether timely notice or written claim was given and whether psychological treatment or medical treatment for physical injuries is appropriate. In Docket No. 267,234, claimant requests review of the ALJ's finding that her need for psychological treatment stemmed from her injuries in Docket No. 265,611 rather than injuries claimed in Docket No. 267,234.

In Docket No. 265,611, respondent asserts that claimant's Application for Review sets out a claimed date of accident of January 1, 1998. But claimant testified that she was injured on January 1, 1997, not 1998. Respondent also sets out that claimant has failed to file an amended Application for Hearing to change the date of accident from 1998 to 1997. In Docket No. 267,234, respondent requests review of the ALJ's findings that claimant met with injury by accident that arose out of and in the course of her employment and that claimant provided timely notice of her alleged accidental injury.

The issues for the Board's review are:

Docket No. 265,611

- (1) What is the Board's jurisdiction in this appeal from a preliminary hearing order?
- (2) Did claimant make a timely written claim?
- (3) If so, is claimant's need for psychological and medical treatment a result of injuries suffered in the course of her employment with respondent in this docketed claim?

Docket No. 267,234

- (1) What is the Board's jurisdiction in this appeal from a preliminary order?
- (2) Did claimant meet with personal injury by accident that arose out of and in the course of her employment with respondent on the dates alleged?
- (3) If so, did claimant provide timely notice of her alleged accidental injury?

¹ By agreement, all of the exhibits that were introduced into the record during the preliminary hearing in Docket No. 265,611 were offered and admitted by reference into the record of the preliminary hearing in Docket No. 267,234. P.H. Trans., Docket No. 267,234 (July 20, 2007) at 4.

(4) If so, is claimant entitled to psychological treatment as it relates to the physical injuries suffered in Docket No. 267,234?

FINDINGS OF FACT

Claimant has filed at least three workers compensation claims alleging injuries suffered while working for respondent, but this appeal involves only two of those claims.² In Docket No. 265,611, claimant contends she was injured on January 1, 1998,³ when she slipped and fell, injuring her “[l]eft knee, left ankle, left foot, back, body and all parts injured or affected by injury including any and all systems.”⁴ In Docket No. 267,234, claimant asserts she was injured in a series of accidents from May 31, 2000, to April 24, 2001, caused by “performing repetitive lifting, bending, and twisting in [the] course of employment.”⁵ In Docket No. 267,234, claimant contends she injured her “neck, back, arms, shoulders, legs [and] associated body parts.”⁶

Docket No. 265,611

Claimant began working for respondent in August 1996. She testified that in January 1997, she fell at work and injured her left knee and back. Her former attorney, however, filed an Application for Hearing setting out a date of injury of January 1, 1998. After claimant fell, she sat down for a short while, and her foot began to swell. A supervisor noticed she was sitting and became upset. Claimant claims that she told the supervisor, who was a “supervisor of the supervisors,”⁷ that she had fallen and wanted to see a nurse, but he did not believe her. She had no chance to tell any other supervisor. She did not mention her fall and injuries to anyone in a supervisory capacity the day after her fall but kept working in spite of the pain.

Claimant contends that thereafter, she continued to complain of injuries to personnel in the medical clinic. In May 2000, after she again complained of injuries from her fall,

² Docket No. 250,157, which is not included in this appeal, involved multiple body parts but primarily injuries to claimant’s bilateral shoulders, with an accident date of November 11, 1999.

³ In testimony at the Preliminary Hearing, Docket No. 265,611, claimant stated she slipped and fell on January 1, 1997, rather than January 1, 1998. See P.H. Trans. (July 20, 2007) at 7-8.

⁴ Form K-WC E-1, Application for Hearing filed May 10, 2001.

⁵ Form K-WC E-1, Application for Hearing filed June 8, 2001.

⁶ *Id.*

⁷ P.H. Trans., Docket No. 265,611 (July 20, 2007) at 19.

respondent sent her to see Dr. J. Rob Hutchison.⁸ Surgery was performed on her left knee by Dr. Jeffrey MacMillan on December 6, 2000. She still has pain every day related to her injuries from the January 1997 fall. She is currently seeing Dr. Lynn Curtis for treatment of her physical injuries, and is seeing Jeanne Frieman, Ph.D., for her psychological injuries.

Claimant was fired by respondent on April 26, 2001, for leaving her work area 30 minutes early. She has not worked since that date.

Claimant testified that she believed most of her problems were related to her fall in January 1997. However, she began suffering worse problems after she was fired by respondent. She now suffers from depression, stating: "It's been very humiliating the way they fire me and it's on lies. They didn't even want me to pick up my things. They already had everything ready for me and that's why my depression is getting worse."⁹ She also stated that she wants to get medical treatment and psychological treatment because she cannot stand the way she's living with the pain. She stated: "All this started when I was working—I was still working there, the way they treat me, it was different."¹⁰

Docket No. 267,234

In Docket No. 267,234, claimant is claiming a series of accidents from May 2000 through April 24, 2001, that injured her back, neck, arms, shoulders and legs. She is claiming that performing repetitive lifting, bending and twisting in her job caused her injuries, and the problems worsened as she continued to work. The pain has continued and has worsened after she was terminated from respondent.

When claimant was asked whether she related her depression to the 1997 fall or the repetitive duty she performed from 2000 to 2001, she stated: "I think it's been the accident [of 1997] plus the different jobs I had."¹¹

Claimant talked to her supervisors during her last six months of work about the fact that her shoulders, neck and arms were bothering her. She does not remember how many times she spoke with her supervisors. She claims they did not listen to her.

⁸ The Division's records do not contain a Form K-WC 1101-A Employer's Report of Accident for either a January 1, 1997, or a January 1, 1998, accident. However, there is an Employer's Report of Accident which was filed on June 12, 2000, dated June 9, 2000, for an alleged left knee injury from a trip and fall on May 31, 2000.

⁹ P.H. Trans., Docket No. 265,611 (July 20, 2007) at 11.

¹⁰ *Id.* at 28.

¹¹ P.H. Trans., Docket No. 267,234 (July 20, 2007) at 8.

Claimant had a previous workers compensation claim for injuries caused by a series of traumas ending November 11, 1999. The case was settled by an Agreed Award on October 24, 2000. Claimant said she was treated but never cured of her pain from those injuries. She was still having problems and pain in her neck, shoulders, arms, back and legs when she settled her claim in 2000. She received restrictions from Dr. Sergio Delgado and Dr. Edward Prostic. As a result of those restrictions, claimant's job at respondent was changed, and she was eventually given the job of packing tongues.

The problems claimant complains of now are the same problems she had before May 2000. She claims the pains and problems increased with the different jobs she was given at respondent. The pain has continued to get worse in the six years since she stopped working at respondent.

Dr. Curtis' report of June 2001, a month and a half after claimant was terminated from respondent, indicated that claimant had an injury to her left knee, low back, and in the shoulder region. Claimant saw Dr. Curtis again on December 15, 2006, at which time he indicated she had bilateral carpal tunnel syndrome. Claimant did not recall if she complained of numbness in her hands when she saw Dr. Curtis in 2001. Dr. Curtis also diagnosed injuries to her neck and elbows in 2006 that were not diagnosed in 2001. Dr. Curtis also thought that claimant showed signs of depression in 2006. That diagnosis was not made in 2001. At the July 20, 2007, preliminary hearing, claimant could not remember when she first spoke with a health care provider about depression but thought it had been about three years before the preliminary hearing.

Claimant has always complained to her supervisors about her problems. She told her supervisors that the job of packing tongues was bothering her arms, neck and back. She worked at the job packing tongues for about seven or eight months. This job required her to take tongues out of a basket and lay them on a table. She would then pack the tongues in a box. She could not say what parts of her body were injured while packing tongues because she had the pain before and everything that hurt before was still hurting. She continued to have pain in her neck, shoulders, arms, hands, and back. Her leg swelled up when she was standing. She asked for medical attention but was told they had already sent her to a doctor and she had an accommodated job.

Medical Evidence

Claimant was seen by Dr. Peter Bieri on October 31, 2001, for an independent medical examination ordered by the ALJ in Docket No. 265,611. In the joint letter from the parties' attorneys, a date of accident of January 1, 1998, was referenced. Dr. Bieri testified that claimant was confused as to how she had injured her left knee. She kept making reference to pain complaints involving her neck, low back and upper extremities, even though the examination was to be limited to her left knee. When asked if she remembered a slip and fall on January 1, 1998, claimant seemed uncertain but eventually stated she

may have injured her knees. She told Dr. Bieri that she had undergone surgery to her left knee on December 6, 2000, but could not recall whether this was related to a work injury.

A review of the report of Dr. Frieman, a psychologist, of December 22, 2006, does not make mention of claimant's slip and fall in January 1997 but does mention a fall on November 15, 1999, where she hurt her left knee. She mentions having surgery on this knee on December 6, 2000. Dr. Frieman has diagnosed claimant with depression and organic brain syndrome. Dr. Frieman also believes that claimant has always had limited intellectual ability or mental retardation. Dr. Frieman stated that claimant's "condition of depression and anxiety are the direct result of her injuries and delayed treatment at [respondent] and the way she was treated while she was working there."¹²

Claimant was first seen by Dr. Lynn Curtis on June 12, 2001, at the request of her attorney for an examination of her injuries related to her fall in January 1997. Dr. Curtis concluded that claimant had a left knee injury solely caused by a fall at work in January 1997. Dr. Curtis also found that claimant developed left S1 radiculopathy while working for respondent, which his reports states was documented by her physician on January 12, 2001, as well as a history of left periscapular myofascial injury since 1996 that improved when she stopped working at respondent. At the time of this examination, claimant's only complaints were of low back and left leg pain. Dr. Curtis' report states that claimant's left hand, arm and shoulder pain resolved after she stopped working at respondent. He found claimant to be at maximum medical improvement, gave impairment ratings for her left leg and low back and released her with restrictions.

Claimant was again seen by Dr. Curtis on December 15, 2006. Claimant complained to Dr. Curtis about pain in her back, leg and ankle from a fall in January 1997. She also complained of pain in her shoulders and arms caused by her work activities. Dr. Curtis diagnosed her with bilateral carpal tunnel syndrome, left greater than right; cervical radiculopathy; probable degenerative joint disease; multiple disc degeneration from C4 through T1; left knee injury, status post arthroscopy; left ankle injury; moderate right lateral and medial epicondylitis; mild to moderate left lateral epicondylitis; and moderate depression, secondary to medical illness.

Claimant was seen by Dr. Jeffrey T. MacMillan on July 20, 2000, for treatment to injuries she suffered in her fall in 1997. Although she testified at the preliminary hearing that she fell in January 1997, she reported to Dr. MacMillan that she fell in February 1997. He diagnosed her with patellofemoral pain and recommended an anti-inflammatory medicine. She reported no relief of her left knee pain, and was then treated with injections. On November 10, 2001, claimant complained of continued left knee pain. She also complained of pain radiating from her left buttock down the posterolateral left lower extremity to the foot and occasional numbness in the left thigh. Dr. MacMillan

¹² P.H. Trans., Docket No. 265,611 (July 20, 2007), Cl. Ex. 1 at 5.

recommended arthroscopic examination. He performed the surgery on December 6, 2000, when he found and repaired a torn left lateral meniscus. When he next saw claimant on December 20, 2000, she reported improvement in her knee pain but complained of global left thigh pain. However, on her January 12, 2001, visit to Dr. MacMillan, she again complained of persistent left knee pain and swelling, with pain radiating from the left buttock all the way down to her left foot. Dr. MacMillan reported that he could not corroborate her complaints on physical examination. An MRI performed on February 1, 2001, found no abnormality in claimant's lumbar spine. Dr. MacMillan released claimant from treatment on April 13, 2001, giving her a 2 percent impairment of the left lower extremity, which converted to a 1 percent whole person impairment.

The records of Dr. J. Rob Hutchison show that he first saw claimant on August 3, 1999, complaining of pain in her upper extremities, neck and back. Dr. Hutchison found she had myofascial back pain with a recent history of flexor tendinitis of the hands. He saw her again on May 31, 2000, at which time claimant was complaining of pain in her left leg, left lower back, and left upper back. She had radiation of pain into her left leg from the knee to the anterior portion of the foot. Dr. Hutchison gave her work restrictions to include no lifting greater than 10 pounds and occasional bend, twist, squat, kneel, climb, or crawl. Dr. Hutchison saw claimant again on June 7, 2000, at which time she was complaining of back pain as well as pain in her left knee and ankle. X-rays taken June 5, 2000, were negative for fracture, dislocation or deformity in her left knee and left ankle. An x-ray of her lumbar spine was also negative. Dr. Hutchison suspected symptom magnification but referred her for an orthopedic consultation.

On August 25, 1999, claimant was seen by Dr. Vito Carabetta. She had complaints of worsening pain in the upper trapezius muscle region. She also had complaints of pain in the upper back bilaterally, upper anterior chest area, both arms, upper cervical region on both sides, and in the sacral area. She also complained of discomfort in the lower extremities at times. She is chronically fatigued and is stiff in the mornings. Dr. Carabetta diagnosed her with myofascial pain syndrome. However, he stated:

It does not appear appropriate to address this problem as a work-related injury, rather it appears there's an underlying condition that has been gradually developing over the years. It does not appear that her work has caused her complaints, rather it is her work that is making her aware of the process that has been developing. Further evaluation and care is indicated on a non-industrial basis.¹³

Claimant was seen by Dr. Edward Prostic at the request of the ALJ on February 29, 2000. Dr. Prostic commented that she had a constellation of complaints but that her greatest physical complaint appeared to be a rotator cuff tendinitis of the left shoulder. He continued to see her through May 9, 2000. He found no abnormality about the cervical or

¹³ *Id.*, Resp. Ex. B at 3.

lumbar spine. He believed her predominant problem was instability of the shoulders, left worse than right. He rated her as having a 10 percent permanent partial impairment of the body as a whole for the symptomatic instability of her shoulders

Dr. Prostic again saw claimant on August 29, 2003, at the request of the ALJ, concerning work-related injuries to her upper extremities, shoulders and neck. Dr. Prostic reported that during the course of her employment with respondent, claimant had sustained repeated minor trauma to her upper extremities and had a rotator cuff tendinitis secondary to instability with significant functional overlay. He did not think she needed any additional treatment and rated her as having a 10 percent permanent partial impairment for symptomatic instability of her shoulders. This examination was in conjunction with claimant's workers compensation claim in Docket No. 250,157.

Claimant saw Dr. Delgado on January 17, 2000, at the request of her former attorney. Dr. Delgado found she had myofascial complaints to the cervicothoracic region caused by the type of work she performed. He found objective evidence of guarding and spasm, as well as trigger points involving the shoulders. She had no trigger points involving the lower lumbar, hip or leg areas. He did not think she had fibromyalgia. Dr. Delgado saw claimant again on June 9, 2000, at which time he rated her as having a 6 percent upper extremity impairment to each shoulder which translated to a 4 percent whole person impairment. He also rated her as having a 5 percent whole person impairment for shoulder girdle region complaints. These ratings are related to her workers compensation claim in Docket No. 250,157.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

¹⁴ K.S.A. 2006 Supp. 44-501(a).

¹⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.¹⁶

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557 states in part:

(a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be

¹⁶ *Id.* at 278.

made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

. . . .

(c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

In *Solorio*,¹⁷ the Kansas Supreme Court stated:

Under the workmen's compensation act of this state, unlike the furnishing of medical aid to an injured employee by an employer, the procurement of medical treatment on his own account by an employee claiming to have suffered injury, after refusal or neglect of his employer to furnish such medical attention, is not tantamount to the payment of compensation within the meaning of G.S. 1943 Supp. 44-520a, and does not toll the running of the period of time within which a claimant must make and serve a claim for compensation in order to maintain a compensation proceeding.

In *Rutledge*,¹⁸ the Kansas Supreme Court stated:

In a workmen's compensation case whenever a period in excess of 120 days [now 200 days] elapses after an accident, during which time no compensation is paid or medical treatment is furnished to claimant by respondent, the claimant's right to file a written claim is not revived by subsequent payment of such compensation or furnishing of medical treatment.

¹⁷ *Solorio v. Wilson & Co.*, 161 Kan. 518, Syl., 169 P.2d 822 (1946).

¹⁸ *Rutledge v. Sandlin*, 181 Kan. 369, Syl. ¶ 2, 310 P.2d 950 (1957); see also *Angleton v. Starkan, Inc.*, 250 Kan. 711, 720, 828 P.2d 933 (1992); *Odell v. Unified School District*, 206 Kan. 752, 757, 481 P.2d 974 (1971).

K.S.A. 44-534a(a) states in part:

(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. . . .

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.²⁰

¹⁹ K.S.A. 44-534a.

²⁰ K.S.A. 2006 Supp. 44-555c(k).

ANALYSIS**Docket No. 265,611**

Issue 1: What is the Board's jurisdiction in this appeal from a preliminary hearing order?

On an appeal from a preliminary order, K.S.A. 44-534a(a)(2) grants the Board jurisdiction to review "[a] finding with regard to a disputed issue of . . . whether . . . claim [was] timely made" Accordingly, the Board has jurisdiction to review Issue No. 2.

As for Issue No. 3, the Board does not have jurisdiction to review an ALJ's preliminary finding that a claimant is or is not in need of medical treatment, whether psychiatric, psychological or otherwise. However, the Board does have jurisdiction to review a finding that the need for treatment is or is not the result of the work-related accident because that gives rise to "whether the employee suffered an accidental injury [and] whether the injury arose out of and in the course of the employee's employment" ²¹ The ALJ did not determine that claimant was in need of psychological and medical treatment in this docketed claim. But he did so in Docket No. 267,234, stating: "Claimant's request for psychological care [is] denied. Her testimony indicated [the] need for such [treatment] stemmed from Docket No. 265,611 (slip & fall)." ²²

Issue No. 2: Did claimant make a timely written claim?

K.S.A. 44-520a(a) requires claimant to serve respondent with a written claim for compensation within 200 days after the date of accident or the last payment of compensation. Under certain circumstances, this time period may be extended to one year. The ALJ determined that "[w]ritten claim was not timely" ²³ but he did not make a specific finding as to either claimant's date of accident or when written claim was served upon respondent. Claimant alleged a date of accident of January 1, 1998, in her pleadings, but she testified to an accident date of January 1, 1997, at the preliminary hearing.

Claimant does not allege she gave respondent any writing that constituted written claim before she filed her Form E-1 Application for Hearing. Instead, claimant argues that her Form E-1 Application for Hearing was her written claim. Claimant filed an Application for Hearing on May 10, 2001, with the Division of Workers Compensation. It was served on respondent at approximately that same time. This was more than 200 days and also

²¹ K.S.A. 44-534a(a)(2).

²² ALJ Order (July 24, 2007), Docket No. 267,234.

²³ ALJ Order (July 24, 2007), Docket No. 265,611.

more than one year after either January 1, 1997, or January 1, 1998, but claimant argues that this claim was timely because respondent subsequently provided her benefits (compensation). However, voluntarily providing workers compensation benefits after the time for filing written claim has expired does not toll the statute or extend the time for filing written claim. The material question is whether respondent provided any compensation within 200 days or one year of the date of accident. Respondent acknowledges providing claimant medical treatment beginning in August 1999 but denies that this treatment was for injuries claimant suffered in a slip and fall accident in either January 1997 or January 1998. There is no evidence that respondent provided claimant compensation within either 200 days or one year of either January 1, 1997, or January 1, 1998, for the injury alleged in this docketed claim. Therefore, based on the record presented to date, claimant has failed to prove she served respondent with a timely written claim. Because of this finding, this Board Member does not need to address the issue concerning claimant's entitlement to psychological or medical treatment in this docketed claim.

Docket No. 267,234

Issue No. 1: What is the Board's jurisdiction in this appeal from a preliminary order?

K.S.A. 44-534a(a)(2) confers jurisdiction on the Board to review an ALJ's determination of disputed issues concerning whether claimant suffered personal injury by accident arising out of and in the course of employment with respondent and whether notice of accident was timely. The Board does not have jurisdiction to decide whether claimant is in need of medical or psychological treatment, but the Board may decide whether claimant's need for treatment is the result of the work-related injury because that gives rise to the issue of whether the injury arose out of and in the course of employment.

Issue No. 2: Did claimant meet with personal injury by accident that arose out of and in the course of her employment with respondent on the dates alleged?

Claimant alleges she suffered injury by a series of accidents while performing her regular work duties through April 24, 2001. Her alleged injuries are partly the result of work-related aggravations of prior work-related injuries. Although many of her symptoms are to areas of her body that were the subject of a prior workers compensation claim or claims with this respondent, claimant testified that those symptoms were aggravated and made more symptomatic by her subsequent work activities with respondent. However, she also testified that her symptoms have continued to worsen even after she stopped working at respondent. Claimant describes her symptoms as injuries to her back, neck, shoulders, arms and legs. She attributes her depression and need for psychological treatment as beginning with and primarily related to her fall in January 1997, but alleges her depression also was aggravated by her subsequent series of accidents and resulting physical injuries.

Claimant has been examined by several physicians in connection with her alleged work-related injuries. Unfortunately, those physicians' reports are not particularly helpful

to the issue of what, if any, injuries claimant suffered as a result of her work activities from May 31, 2000, through April 24, 2001. Dr. Bieri saw claimant in October 2001 primarily for her alleged 1997 or 1998 slip and fall accident and resulting knee injury. Although claimant also reported pain in her neck, low back and upper extremities, Dr. Bieri was not focused on those injuries.

Dr. Frieman, who saw claimant in December 2006, diagnosed claimant with depression and anxiety. She relates those conditions to claimant's work at respondent. But she also relates these conditions to both her physical injuries "and the way she was treated while she was working there."²⁴ Also, she does not give a specific time frame.

In June 2001, Dr. Curtis found that claimant developed a low back injury with radiculopathy in her left leg while working for respondent, as well as a myofascial injury in her upper back, neck and left shoulder. But again, Dr. Curtis is not specific about the dates of these injuries. He suggests they preexisted the date of accident alleged in this docketed claim and does not say whether they were aggravated by her subsequent work activities at respondent. In addition, when Dr. Curtis saw claimant again in December 2006, over five years since claimant last worked at respondent, he diagnosed her with bilateral carpal tunnel syndrome, left greater than right; cervical radiculopathy; probable degenerative joint disease; multiple disc degeneration from C4 through T1; left knee injury, status post arthroscopy; left ankle injury, moderate right lateral and medial epicondylitis; mild to moderate left lateral epicondylitis; and moderate depression, secondary to medical illness. However, he does not give a causation opinion for these new diagnoses.

The records of Dr. Hutchison and Dr. Carabetta are somewhat helpful because they examined claimant while she was still working for respondent. Both made notes of upper and lower back and upper and lower extremity pain. Dr. Carabetta also noted complaints of chest and neck pain. Dr. Hutchison was somewhat ambivalent about causation but gave claimant work restrictions. Dr. Carabetta specifically said that he did not consider claimant's symptoms to be work related.

Dr. MacMillan primarily treated claimant for her 1997 or 1998 (or 2000) knee injury. However, when he saw her in December 2000 and through early 2001, she was reporting pain from her low back and left buttock down to her left foot. He could find no anatomical abnormality to explain these symptoms. It is significant that claimant was given work restrictions and placed in accommodated employment after her knee surgery in December 2000.

Dr. Delgado diagnosed myofascial pain in claimant's cervicothoracic area and shoulders, which he related to claimant's work. However, his opinions and impairment ratings were related to a separate workers compensation claim and series of accident

²⁴ P.H. Trans., Docket No. 267,234 (July 20, 2007), Cl. Ex. 1 at 5.

dates. Dr. Prostic's opinions, likewise, all appear to relate to an earlier workers compensation claim. Even though his examinations took place in 2000 and 2003, which were before and after the series of accidents alleged in this docketed claim, Dr. Prostic does not give separate diagnoses or impairment rating opinions for the separate docketed claims.

The fact that claimant's symptoms continued to worsen while she continued to work for respondent, and continued to worsen even after she stopped working for respondent, does not prove a new series of accidents and injuries. This Board Member finds that the record presented to date fails to prove that claimant suffered a new and separate series of accidents and injuries during the period alleged in this docketed claim. The record fails to prove that her current condition is not a consequence of the prior injuries, some of which were the subject of other docketed claims. Because of this finding, this Board Member need not address the remaining issues in this docketed claim.

CONCLUSION

Claimant has failed to prove that she served a timely written claim upon respondent for the injuries alleged in Docket No. 265,611.

Claimant has failed to prove she suffered personal injuries by a series of accidents from May 31, 2000, through April 24, 2001, arising out of and in the course of her employment with respondent in Docket No. 267,234.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated July 24, 2007, in Docket No. 265,611 is affirmed. The Order of Administrative Law Judge Brad E. Avery dated July 24, 2007, in Docket No. 267,234 is reversed.

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge